(Slip Opinion)

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the Matter of:	)	
General Electric Company	)	RCRA Appeal No. 91-7
Permittee	)	
Permit No. MAD 002 084 093	)	

[Decided November 6, 1992]

REMAND ORDER

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

GENERAL ELECTRIC COMPANY

RCRA Appeal No. 91-7

REMAND ORDER

Decided November 6, 1992

Syllabus

On March 13, 1992, the Environmental Appeals Board granted review of a petition filed by General Electric Company challenging the corrective action portion of a permit issued by EPA Region I under the Resource Conservation and Recovery Act. In its petition, GE raises issues relating to: (1) coordination between the Region and State agencies that are also regulating the GE facility; (2) the absence of any review mechanism in the permit that would allow GE to challenge Regional revisions of GE's interim submissions; (3) the Region's authority to impose certain corrective action requirements in areas beyond the boundaries of the facility; (4) the need for certain interim measures; (5) the need for certain RFI requirements; (6) certain deadlines in the permit; and (7) the inclusion in the HSWA portion of the permit of "general conditions" drawn from the "boilerplate" requirements of 40 CFR §270.30.

Held: The Board concludes that: (1) the coordination agreements between the Region and Massachusetts and between the Region and Connecticut satisfy the Agency's strong policy of promoting cooperation between EPA and State agencies; (2) the Region did not exceed its statutory authority to regulate off-site contamination under RCRA §3004(v) because the language of the permit restricts its application to off-site contamination that migrated from GE's facility; (3) one of the interim measures being challenged is reasonable and need not be altered, while two of the interim measures being challenged are being remanded for further consideration by the Region; (4) the RFI requirements being challenged by the Region are reasonable and need not be altered; (5) the deadlines in the permit need not be changed because, in the absence of evidence that the Region has abused its discretion, the Board will normally defer to the Region's judgment as to how much time a permittee will need to perform a particular task; (6) Section 270.30, which prescribes certain "boilerplate" provisions that must be included in all RCRA permits, neither requires nor authorizes the Region to include such requirements in the HSWA portion of a permit; if the Region wants to include such a provision in the HSWA portion of the permit, it must find authority for it under 40 CFR §264.101, the corrective action rule, and it must tailor the provision if necessary to reflect its intended application to corrective action activities. The Board is reserving judgment on the absence of a review mechanism for Regional revisions of interim submissions.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Reich:

On March 13, 1992, the Environmental Appeals Board granted review of a petition filed by General Electric Company challenging the corrective action portion of a permit issued by EPA Region I under the Hazardous and Solid Waste Amendments ("HSWA") to the Resource Conservation and Recovery Act of 1976 ("RCRA"). The permit, which was issued February 8, 1991, is for GE's manufacturing facility in Pittsfield, Massachusetts. [1] At the request of the Agency's Judicial Officer, the Region submitted a response to the petition. [2] GE also

[1] The non-HSWA portion of the permit was issued by the Commonwealth of Massachusetts, an authorized state under RCRA §3006(b), 42 U.S.C. §6926(b).

[2] At that time, the Agency's Judicial Officers provided support to the Administrator in his review of permit appeals. Subsequently, effective on March 1, 1992, the position of Judicial Officer was abolished, and all cases pending before the Administrator, including this case, were transferred to the

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submitted a reply brief, and both the Region and GE submitted supplementary briefs in response to the Board's grant of review in this case. For the reasons set forth below, we are remanding certain issues raised by GE for reconsideration by the Region, and we are dismissing others.

I. *BACKGROUND*

GE's Pittsfield facility, which encompasses 250 acres, is adjacent to the Housatonic River. Unkamet Brook flows through the facility and empties into the Housatonic River. The property slopes towards the Housatonic River and includes portions of the river's and Unkamet Brook's 100-year floodplains. Regionally, the direction of groundwater flow is primarily toward the river with local variations. GE has owned the property since 1903. The facility is divided into three major production areas: the Transformer Division; the Ordnance Division; and the Plastics Division. At the facility, GE has manufactured or is still manufacturing electrical transformers, capacitors, regulators, synthetic resins, molding compounds, missile-guidance systems, and other ordnance-related systems. From 1932 to 1977, GE used polychlorinated biphenyls ("PCBs") in the operation of its transformer plant to make pyranol, an insulating oil. Along with PCBs, other hazardous wastes were generated at the facility and disposed of in a variety of ways on and off-site. Petition for Review, Exhibit C, EPA Fact Sheet, at 3.

The areas covered by the Region's HSWA permit are also subject to regulation by the Massachusetts Department of Environmental Protection ("MDEP") under a detailed State regulatory scheme set forth in the Massachusetts "Superfund" law (Mass. Gen. L. Chapter 21E) and the Massachusetts Contingency Plan (MCP), 310 Code of Mass. Regs. (CMR) 40.001 *et seq*. Like the RCRA corrective-action process, that State regulatory scheme sets forth a phased process requiring investigations of the sites, studies of remedial options, implementation of remedial actions, and the performance of short-term measures in the interim, as necessary. Pursuant to those State authorities, GE and the MDEP have executed two Consent Orders requiring detailed investigations, remedial-action studies, and short-term measures for the sites involved here, including both the GE Facility and the Housatonic River, except for the portion of the river in Connecticut. With respect to that portion of the river, GE has entered into a Cooperative Agreement with the Connecticut Department of Environmental Protection requiring GE to undertake an investigative program.

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[2](...continued)
Environmental Appeals Board. See 57 Fed. Reg. 5321 (Feb. 13, 1992).

On March 13, 1992, the Environmental Appeals Board granted review of the petitions for review filed by GE and Massachusetts, and oral argument was scheduled on certain issues involving Federal/State coordination. [3] However, when the parties settled the most significant issues scheduled for oral argument, the Board canceled the oral argument.

II. *DISCUSSION*

Once the Board has granted review under 40 CFR §124.19(a), it will overturn a Regional Administrator's permit decision if the Board concludes that: (1) there is an error of fact or law in the Regional Administrator's decision; (2) for important policy reasons, the Regional Administrator should have reached a different result; or (3) the Regional Administrator abused his or her discretion. On review, the burden is on the petitioner to show that the Regional Administrator's decision should be overturned.

In its petition, GE raises issues relating to: (1) coordination between the Region and Massachusetts; (2) the absence of any review mechanism in the permit that would allow GE to challenge Regional revisions of GE's interim submissions; (3) the Region's authority to impose certain corrective action requirements in areas beyond the boundaries of the facility; (4) the need for certain interim measures; (5) the need for certain RFI requirements; (6) certain deadlines in the permit; and (7) the inclusion in the HSWA portion of the permit of "general conditions" drawn from the "boilerplate" requirements of 40 CFR §270.30. Each of these issues is discussed below. [4]

A. *Federal/State Coordination*

GE states that the Massachusetts Consent Orders address the same areas and types of activities covered by the EPA permit. GE is concerned that, if EPA and Massachusetts do not coordinate their efforts, GE will be faced with conflicting and duplicative requirements. In recognition of the concerns raised by GE, the State of Massachusetts and the Region recently entered into a Memorandum of Understanding ("MOU"), which provides several mechanisms to promote cooperation and coordination between the two jurisdictions. *See* June 26, 1992 letter from Ken Nickolai, Assistant Regional Counsel, to James W. Black, Counsel to the Environmental Appeals Board (enclosing Memorandum of Understanding).

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[3] Massachusetts has since withdrawn its petition for review.

[4] In its petition, GE raised other issues for review that were subsequently settled and withdrawn.

Under the MOU, the parties agree that: (1) each party will address and respond to requests by the other party concerning the approval or disapproval of proposals, reports, and plans submitted by GE; (2) each party will identify a key technical staff person who will serve as the initial point of contact for implementation of the MOU and who will confer with his or her counterpart at the other agency at least once a month; (3) Massachusetts' key technical staff may participate fully in EPA's technical review process; (4) each party agrees to provide the other party with any comments on proposals, reports and plans submitted by GE within 30 days of receipt; (5) each party agrees to transmit by facsimile or by some other method any proposed approvals or disapprovals of plans, reports, and proposals submitted by GE so that the other party will have seven working days prior to public issuance to review such document; and (6) each party will follow the dispute resolution procedures set out in the MOU for resolving disputes between the parties involving approval or disapproval of reports, plans, and proposals submitted by GE.

The Memorandum of Understanding also provides that nine months after the effective date of the MOU and annually thereafter, the parties will evaluate and discuss the effectiveness of the MOU in achieving the environmental objectives of the Permit and the Consent Orders and the implementation schedules of the MOU. If, after such evaluation, either side is dissatisfied with the effectiveness of the MOU in achieving such environmental objectives or implementation schedules, either may call a meeting to discuss methods to improve the effectiveness of the MOU and to consider alternative means of cooperation presented by the other. If after such a meeting, either side continues to be dissatisfied with the effectiveness of the MOU in achieving the environmental objectives or implementation schedules, either agency may provide the other with written notice of its withdrawal from the MOU. Such withdrawal will be effective thirty days from the date such notice is received by the other party. Memorandum of Understanding, Paragraph 14, at 5-6.

In a June 29, 1992 letter to the Board, counsel for GE argues that this MOU is flawed because of the provision allowing the parties to withdraw from the agreement if they cannot resolve differences between themselves. GE urges the Board to retain continuing jurisdiction in case the agreement fails to ensure coordination or in case the parties withdraw from the agreement. If the Board is not willing to retain jurisdiction over the matter, GE urges the Board to direct the Region to seek a revised MOU that will offer more protection for GE. Specifically, GE proposes that the MOU incorporate what it calls the "lead agency" approach. Under that approach, the MOU would provide as follows: (1) the Region's permit will be suspended, and GE will comply with the Massachusetts consent orders; (2) MDEP will serve as the lead agency for purposes of regulating the investigations

and remedial actions at the site, while the Region will be kept informed and given an opportunity to comment on submissions by GE and directives by MDEP; (3) if at any time the Region makes a finding that MDEP's implementation of the MCP at the sites is not adequate to comport with the overall objectives of the RCRA corrective action program, the Region will notify MDEP of the deficiency, and if, after a reasonable period of time, the Region determines that the deficiency has not been corrected, EPA can reassert its corrective-action authority under RCRA and activate its corrective action permit; (4) if the Region reasserts its authority, the Region will thereafter serve as the lead agency, and MDEP will serve in the same reviewing role formerly played by the Region.

As an alternative to the lead agency approach, GE suggests other revisions of the MOU that it believes will address its concerns in a satisfactory manner. For example, GE believes that the MOU should provide that, for a given area subject to the MOU, GE will not be required to proceed to a subsequent step in the process until both the MDEP and Region I have approved the prior submission. Another of GE's proposed revisions would provide that, if one agency but not the other issues its approval of a GE submission within the specified time-frame, and if GE seeks but cannot obtain an extension of time from that agency to perform the next task, then the agency that had not yet issued a decision would agree that GE may go forward under the decision that had been issued. This agency would not be able to issue a separate approval/disapproval decision on the submission at some later time requiring additional or different work.

The initial question before us is whether the Region is obligated legally or as a matter of policy to seek revision of its MOU with Massachusetts to incorporate the changes suggested by GE or any other changes. For the following reasons, we do not believe that the Region has any such obligation. First, there is no legal basis for requiring the Region to enter the kind of MOU that GE proposes. Neither the statute, nor the implementing regulations, nor the proposed corrective action regulations contain any such legal requirement. It is true that the statute lists as one of its objectives:

> [E]stablishing a viable Federal-State partnership to carry out the purposes of this chapter and insuring that the Administrator will, in carrying out the provisions of subchapter III of this chapter give a high priority to assisting and cooperating with States in obtaining full authorization of State programs under subchapter III of this chapter.

RCRA §1003(a)(7), 42 U.S.C. 6902. However, the Federal-State partnership referred to in the quoted passage is one in which the Agency will assist the States in their obtaining authorization and in implementing RCRA. While Section 1003(a)(7) supports the Agency's policy on cooperation as discussed below, the quoted passage certainly cannot be read to require an MOU between the Region and Massachusetts to coordinate implementation of RCRA and the State superfund statute. In fact, the agreement between the Region and Massachusetts, being focused specifically on the GE facility, goes far beyond the level of cooperation envisioned in Section 1003(a)(7). [5]

While the Region is under no legal obligation to enter into a memorandum of understanding, the Agency has adopted a strong policy of promoting Federal/State cooperation of the kind at issue here. For example, in a recent study on the implementation of RCRA, the Agency's Office of Solid Waste & Emergency Response ("OSWER") recommends that EPA not only encourage States to become authorized for RCRA corrective action, but also "[a]cknowledge the work states do under their own corrective action authorities, and promote joint EPA/state cleanup activities with the goal of getting more cleanup done." *The Nation's Hazardous Waste Management Program at a Crossroads: The RCRA Implementation Study*, Office of Solid Waste & Emergency Response, EPA/530-sw-90-069, at 84 (July 1990). OSWER also recommends that the Agency "[c]ut back on oversight for both authorized and unauthorized states to prevent duplication of oversight." *Id*. The policy is also reflected in the preamble to the Codification rule for the 1984 RCRA Amendments:

> States with authorized RCRA programs may already have requirements similar to those in today's rule. * * * Of course, States with existing [State] standards may continue to administer and enforce their standards as a matter of State law. In implementing the Federal program, EPA will work with States under cooperative agreements to minimize duplication of efforts. In many cases, EPA will be able to defer to the States in their efforts to implement their programs, rather than take separate actions under Federal authority.

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[5] In support of its position that the Region is obligated to coordinate its efforts with the States, GE also cites RCRA §1006(b), 42 U.S.C. §6905, which provides that the Administrator must integrate implementation of RCRA with implementation of other federal statutes that grant regulatory authority to the Administrator. We fail to see how this supports the argument that the Administrator must coordinate implementation of RCRA with state implementation of state statutes.

52 Fed. Reg. 45796 (December 1, 1987).

In this case, the Region has clearly acknowledged this policy, and the MOU reached by the Region and Massachusetts fully satisfies the Region's obligation to coordinate its efforts with those of the State. GE objects to the MOU because, in its view, the agreement does not ensure a perfect coordination between the parties.

We agree that the MOU reached by the Region and Massachusetts does not provide an ironclad guarantee that there will never be a problem, but we also believe that such a guarantee could only be bought at an unacceptable price: the Region would have to compromise its ability and responsibilities to carry out the dictates of the RCRA statute, a compromise the Agency is not authorized to make. [6] As GE acknowledges in its petition, "EPA has a duty under HSWA to ensure, through the corrective-action permit, that all releases of hazardous constituents from SWMUs and other areas legitimately included in the permit are adequately addressed, and that EPA cannot be bound in this respect by the State regulatory programs." Petition for Review, at 21.

We believe that the Regions should be accorded a large measure of discretion in determining the appropriate level of and mechanism for cooperation with State programs. It is sufficient that the Region has evidenced a good faith willingness to coordinate its efforts with those of Massachusetts consistent with Agency policy. Having made that determination, we will not second-guess the Region's judgment as to the particular mechanism used to effect such cooperation.

As for the third option suggested by GE -- retaining jurisdiction over the case -- we conclude that such an approach would not be appropriate. The purpose of this Board is to determine whether the permit was appropriately issued. The Board has no oversight responsibility for the implementation of a validly issued permit. Once we have satisfied ourselves of the Region's good faith willingness to cooperate, and thus its compliance with Agency policy in the issuance of the permit, we have no basis for retaining jurisdiction to address any implementation issues that may arise.

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[6] The vehicle created by the statute to eliminate conflict and duplication is the State authorization process, *i.e.*, Massachusetts seeking and obtaining authorization from EPA to assume responsibility for issuing the corrective action portions of RCRA permits. Until a State applies for and receives such authorization, the statute assigns that responsibility to the Agency. RCRA §3006(g)(1), 42 U.S.C. §6926(g)(1). The Agency may not abdicate that responsibility.

In its petition for review, GE similarly argues that the Agency's corrective action permit as it applies in Connecticut overlaps with the Connecticut Cooperative Agreement. GE believes that the Region and Connecticut should coordinate their efforts to save GE from facing duplicative or conflicting requirements. The State of Connecticut also filed a petition for review making the same argument. We are dismissing this issue, however, for two reasons. First, GE has provided scant evidence of the conflicts and duplication between Connecticut requirements and Agency requirements that it believes would occur in the absence of a coordination mechanism in the permit. Second, Connecticut has now withdrawn its petition for review, because it has entered into a settlement agreement with the Region. Counsel for Connecticut states that the agreement "substantively resolves Connecticut's concerns raised in the captioned petition [for review]." *See* August 17, 1992 letter from Richard F. Webb, Connecticut Assistant Attorney General, to James W. Black, Counsel to the Environmental Appeals Board. Connecticut's statement that its concerns have been satisfied persuades us that the Region has successfully fulfilled its obligation to coordinate its efforts with those of Connecticut. Accordingly, this issue is dismissed.

B. *Regional Revisions of Interim Submissions*

GE argues that the permit allows the Region to impose substantial obligations on GE with no mechanism for review. GE explains that the permit sets up an extended schedule of proposals and approvals prior to the Region's ultimate selection of the corrective measures to be implemented. If the Region disapproves a proposal, it has authority under the permit to specify the deficiencies and require GE to submit a modified proposal. If the Region then disapproves the modified proposal, the Region may either require further modifications or else make such modifications as it deems appropriate. Upon approval by the Region, the modified proposal will become an enforceable part of the permit. GE complains that if it disagrees with the modifications imposed or required by the Region, the permit provides no procedure for GE to obtain review of the modifications. GE argues that the absence of a review mechanism in the permit is contrary to EPA policy and violates GE's right to due process of law under the U.S. Constitution.

As GE recognizes in its Supplementary Brief, this issue was addressed in *In re W.R. Grace & Company*, RCRA Appeal No. 89-28 (March 25, 1991). [7]

[7] Among the interim submittals that GE is required to make under the permit are an interim measures proposal and an interim measures report. Petition for Review, Exhibit A, Final Permit, at 108

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There, the Administrator upheld a permit that, like the permit at issue here, did not contain a review mechanism for Regional revisions of interim submissions. However, the Board recently granted review and scheduled oral argument on issues that bear on the scope and effect of the *Grace* decision. *See In re Allied-Signal, Inc., Metropolis, Illinois)*, RCRA Appeal No. 92-1 (EAB, November 3, 1992) (Order Granting Review and Scheduling Oral Argument). The Board granted review because it was concerned that *Grace* may require further explication. The Order Granting Review and Scheduling Oral Argument presents the following issues that the parties in Allied-Signal should address in their briefs and should be prepared to discuss at oral argument:

> 1. The Administrator ruled in *Grace* that a Region's revision of an interim submission is not a modification of the permit for purposes of the formal modification rule at 40 CFR §270.41. In contrast, the Region treats the selection of a corrective measure as a modification of the permit that is subject to the formal modification rule. What is the legal or policy basis for treating the selection of a corrective measure as a permit modification, while not treating the Region's revision of an interim submission as a permit modification? In other words, how does the Agency decide that some, but not all, new permit terms will be incorporated into the permit through means of the formal permit modification procedures?
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> 2. The *Grace* decision requires that in the event of a Regional revision of an interim submission, the Region must provide the permittee with some sort of informal "hearing" procedure in order to satisfy the requirements of procedural due process. Would the following procedure satisfy the requirements of procedural due process: (i) the Region must give a reasoned explanation in writing of its revision; (ii) the permittee must be provided with an opportunity to demonstrate, through written comments, that the Region's proposed revision is unnecessary; and (iii) the Region must consider the permittee's comments and provide a written response to them?

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[7](...continued)
- 113. Although the interim submittals at issue in *Grace* did not include any relating to interim measures, we believe that the rationale articulated in that decision applies with equal force to interim submittals relating to interim measures.

3. If the informal hearing procedure outlined in paragraph 2 would not satisfy the requirements of procedural due process, what additional Agency procedures would be necessary to satisfy those requirements?

4. If the Board determines that a particular informal hearing procedure is necessary to satisfy the requirements of procedural due process, should the Board require the Region to incorporate that procedure in the permit?

5. Does the *Grace* decision, by holding that the revision of an interim submission is not a permit modification under 40 CFR §270.41, unlawfully deprive permittees of a statutory right to judicial review by preventing permittees from invoking Section 7006(b), which provides that any interested person may obtain judicial review of the Administrator's action modifying the permit in the U.S. Court of Appeals?

6. If a permittee is unable to obtain judicial review under Section 7006(b), when and under what circumstances could a permittee obtain judicial review of a Regional revision of an interim submission?

In light of the grant of review in the *Allied-Signal* case, we are reserving judgment on this issue. The parties in this proceeding may if they wish file briefs addressing any or all of the issues designated in the Order Granting Review and Scheduling Oral Argument in the *Allied-Signal* case. The briefs should be filed not as amicus briefs in the *Allied-Signal* case, but as supplementary briefs in this case. Any such briefs should be submitted by December 9, 1992.

C. *Jurisdiction Over Off-Site Areas*

Newell Street Oxbow: From the 1930s to the late 1950s, a former marsh area near the Housatonic River was filled with debris and solid and hazardous waste. Part of the filled area was made into a parking lot and is part of the GE Facility (designated SWMU G-6). The rest of the filled area, which is contiguous to the GE Parking Lot, is beyond the boundaries of the GE Facility ("Newell Street Oxbow area"). SWMU G-6 and the Newell Street Oxbow are both located in a part of the facility that the permit designates "Area 5." Area 5 also includes SWMU G-21, which is not relevant here. The permit requires GE to conduct preliminary RFI investigations not only for the GE Parking Lot, but also for any parts of the

Newell Street Oxbow area to which contamination from the GE Parking Lot is migrating or has migrated. Petition for Review, Exhibit A, Final Permit, at 15. The permit also imposes an interim measure requiring GE to remove all high concentrations ("hot spots") of PCB-contaminated soil from SWMU G-6. Petition for Review, Exhibit A, Final Permit, at 111.

The Newell Street Oxbow area is not a SWMU. The permit defines SWMU as "any unit *at the facility* which contains or contained solid and/or hazardous waste," Petition for Review, Exhibit A, Final Permit, at 7 (emphasis added), and defines "facility" as "all contiguous land, and structures, other appurtenances, and improvements on the land, *under the control of the owner or operator on November 8, 1984*." *Id*. at 5 (emphasis added). It is undisputed that the Newell Street Oxbow was neither owned nor controlled by GE on November 8, 1984. Nevertheless, the Agency has authority under RCRA §3004(v), 42 U.S.C. 6924(v), and 40 CFR §264.101(c) to impose corrective action requirements for contamination beyond the boundaries of the facility if the contamination migrated to the off-site area from the facility. In its petition, GE argues that "Region I's response to comments makes quite clear that it intends [the scope of the RFI requirements] to cover portions of the Newell Street Oxbow beyond the GE Parking Lot and thus beyond the Facility boundary." Petition for Review, at 36. A review of the Region's response to comments on this issue confirms that the Region does believe that contamination from the GE Parking Lot has migrated to portions of the Newell Street Oxbow area. Petition for Review, Exhibit B, Region's Responsiveness Summary, at 3-134 - 3-135. GE contends that the contamination found in the Newell Street Oxbow area did not migrate from the GE Parking Lot but resulted instead from the same filling activities that caused contamination in the GE Parking Lot. GE asserts, therefore, that the Region does not have authority under RCRA §3004(v) to require corrective action for contamination in the Newell Street Oxbow area.

The permit provisions being challenged impose preliminary RFI requirements for Area 5, and the permit describes Area 5 as follows:

> This area includes SWMU G-6 and SWMU G-21 and surrounding areas to which releases of hazardous waste and/or hazardous constituents originating on GE property are migrating and/or have migrated. Both SWMU G-6 and SWMU G-21 are former oxbow or marsh areas which have been filled with solid waste and debris. Investigations to date indicate wastes containing hazardous constituents have been disposed of in the area.

Petition for Review, Exhibit A, Final Permit, at 15. Thus, the permit specifically defines Area 5 as including surrounding areas to which there is or has been migration. As such, it clearly does not cover areas to which contamination from the GE Parking Lot has *not* migrated. Accordingly, if contamination from the GE Parking Lot has not migrated into the Newell Street Oxbow area, the RFI requirements do not apply to the Newell Street Oxbow area. Thus, the RFI requirements challenged by GE, as written, do not exceed the Agency's authority under Section 3004(v) and Section 264.101(c), since the requirements only cover areas to which hazardous wastes from the GE Parking Lot have migrated. As we read the petition, however, GE is not really calling into question the propriety of the permit as written. Rather, GE is challenging the statements in the Region's response to comments expressing the Region's intended implementation of the permit. As noted earlier, however, the role of the Board is to determine whether the permit was appropriately issued. The Board has no oversight responsibility for the implementation of a validly issued permit. [8]

The permit also imposes an interim measure requiring GE to "propose a plan to remove all high concentrations ('hot spots') of PCB-contaminated surficial soil from SWMU G-6 (Newell Street-GE Parking Lot Site)." GE makes the same jurisdictional argument about the interim measure as it makes about the RFI requirements.

It is not clear whether the term "SWMU G-6" in the interim measure refers only to the GE Parking Lot, or whether it refers to the GE Parking Lot *and* off-site portions of the Newell Street Oxbow area. The permit defines "SWMU" as "any unit at the Facility," *Id*. at 7, so under a literal reading of the permit, the

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[8] An argument similar to GE's was considered in *In re BFGoodrich Company*, RCRA Appeal No. 89-29 (December 19, 1990). In that case, BFGoodrich challenged an assertion made by Region IV in its response to comments on the draft permit that the permit definition of "SWMU" is broad enough to include an area contaminated by routine, systematic, and deliberate discharges from process areas. The Administrator determined that the issue was not yet ripe for review, observing that:

> [T]he Agency's rules provide that petitioners may seek review of permit conditions, not isolated assertions in the administrative record regarding the Region's intended application of the permit. *See* 40 CFR §124.19(a). Because BFGoodrich's petition does not directly call into question the propriety of any specific permit term in this regard, the issue may not be raised on appeal of the permit.

Id. at 4. The same reasoning applies to the RFI requirements challenged by GE. *See also In re Midwest Steel Division, National Steel Corp.*, RCRA Appeal No. 88-38, at 2-3 (August 27, 1990)(Region's intended application of a permit term prohibiting the acceptance of off-site waste is not subject to review under §124.19).

term "SWMU G-6" would only refer to the GE Parking Lot since that is the only part of the filled area "at the Facility." Read in the context of the entire permit, however, we believe such a literal reading is not justified. As noted earlier in the discussion of the RFI requirements relating to Area 5, the Region is concerned not only with contamination of the GE Parking Lot but also with contamination that is migrating or has migrated from the GE Parking Lot to the Newell Street Oxbow. Moreover, immediately following the term "SWMU G-6" in the interim measure are the words "(Newell Street-GE Parking Lot Site)," suggesting that the interim measure is meant to cover portions of the Newell Street Oxbow area. Accordingly, we read the interim measure as applying to areas beyond the GE Parking Lot. However, because the Agency could lawfully regulate only those off-site areas to which contamination from the GE Parking Lot is migrating or has migrated, we read the interim measure as covering only those parts of the Newell Street Oxbow to which contamination from the GE Parking Lot is migrating or has migrated. So interpreted, the interim measure does not exceed the Agency's authority under RCRA §3004(v), since it only applies to those "hot spots" in the Newell Street Oxbow that migrated to their present position from the GE Parking Lot. Under such an interpretation, GE's only remaining concern is the Region's intended implementation of the interim measure. As noted above, however, the Board has no oversight responsibility for the implementation of a validly issued permit.

Allendale Elementary School: The permit requires as an interim measure that GE propose a plan for taking soil samples on the grounds of the Allendale Elementary School, for erecting a continuous chain-link security fence there, and for remediation of surficial soil contamination at the school yard. The Allendale School is located to the north of, and across the road from, the GE Facility. The school is located near SWMU G-5 ("the Building 78 Landfill"), which according to the Region has been in use since 1903 as a disposal unit for construction debris and other solid and hazardous waste, including PCBs. The Region states that soil sampling at the landfill has confirmed the release of PCBs and raises the potential of entrained PCB particulates being transported by wind to the Allendale property. The Region states further that it has confirmed the presence of PCBs in the surface and subsurface soils of the school yard, in some instances up to 1800 ppm.

GE challenges the Region's assertion of jurisdiction over the Allendale School, arguing that the PCBs at the Allendale School did not migrate from the Building 78 Landfill but resulted from historic filling activities. Since the filing of GE's reply brief, however, GE represents that it has completed remediation of the Allendale School Yard under a short-term measure plan approved by the MDEP. In response to this remediation, the Region has agreed to delete the interim measure dealing with the Allendale School Yard. However, because the Region has stated

its intention to seek a modification of the permit that would include the school within Area 2, for which RFI requirements have been prescribed, GE wants the Board to hold that EPA's jurisdiction under the permit does not extend to the school yard. This we decline to do, for the interim measure is the only part of the permit relating to the Allendale School and if that is deleted, there is no longer a permit term to review. Accordingly, we are dismissing this issue as moot. If the permit is modified, as GE expects it to be, that will be the time to file an appeal.

D. *Interim Measures*

Under the permit, GE is required to submit an Interim Measures Proposal for review and approval by the Region, detailing the methodology and procedures to be followed in order to complete 13 interim measures specified in the permit. GE challenges three of those interim measures. Each is discussed below.

Interim Measure 8: This interim measure requires GE to propose a plan for removing high concentrations ("hot spots") of PCB-contaminated surficial soil from SWMU G-6 (Newell Street-GE Parking Lot site). As discussed in the previous section of this opinion, we have interpreted this interim measure as covering only those hot spots outside the facility that resulted from the migration of contamination from the GE Parking Lot. GE argues that the PCB hot spots do not present an imminent or substantial threat to human health or the environment. It argues further that, even if some interim measure is required, there is no justification for requiring removal of the PCB-contaminated surficial soil. GE believes that a combination of covering and fencing the hot spots would adequately address the Region's concerns about exposure. GE also points out that the Massachusetts DEP has recently approved a short-term measure proposed by GE that calls for a combination of fencing, restricting access to, and paving parts of the Newell Street Oxbow that contain elevated PCB levels in the surficial soil.

The Region responds that the Agency does not need to show an "imminent or substantial threat" before imposing an interim measure. The Region believes that the proper standard for interim measures was articulated by the Administrator in *In re BFGoodrich Company*, RCRA Appeal No. 89-29 (December 19, 1990). In that case, the permittee challenged an interim measure requiring it to contain a plume of groundwater contamination. BFGoodrich argued that the plume did not pose an immediate threat to human health and the environment. The Administrator rejected this argument, making the following observations:

> BFGoodrich is correct that the use of interim measures should be based on the immediacy and magnitude of the threat involved

> (*see* 55 Fed. Reg. at 30839), but the requisite degree of immediacy that justifies such measures depends in part on the amount of time needed to establish and implement permanent corrective action measures. * * * The Agency need not wait until human or environmental receptors are actually exposed to dangerous levels of contamination before it concludes that the risk posed by a contaminant plume is of sufficient immediacy and magnitude to warrant interim measures.

Id. at 8.

The Region also cites the proposed Subpart S rule, which contains a list of factors that the Region may consider in determining whether an interim measure is necessary. 55 Fed. Reg. 30,880 (July 27, 1990)(proposed §264.540). [9] The Region believes at least four of those factors support imposition of the interim measure at issue. The first factor is the "[t]ime required to develop and implement a final remedy." *Id*. (proposed §264.540(b)(1)). The Region argues that, given the complexity of the GE site and the nature and extent of work being implemented under both state and federal authorities, final remediation is likely to be many years away. The second factor is "[a]ctual or potential exposure of nearby populations or environmental receptors to hazardous wastes (including hazardous constituents)." *Id*. (proposed §264.540(b)(2)). The Region argues that this factor supports an interim measure because of the continued contamination of the Housatonic River and its dependent ecosystem. The third factor is the "[p]resence of high levels of hazardous wastes (including hazardous constituents) in soils largely at or near the surface, that may migrate." *Id*. (proposed §264.540(b)(6)). The Region argues that this factor is important because of the proximity of local businesses, social clubs, and residences. The last factor is "[o]ther situations that may pose threats to human health and the environment." *Id*. (proposed §264.540(b)(9)). The Region notes that in the preamble to the proposed rule, an example is given of the type of situation covered by this last factor. The example is a situation in which surficial soil contamination is adjacent to a drinking water source. 55 Fed. Reg. 30,839 (July 27, 1990). The Region argues that the example is similar to the situation at issue here because surficial soil contaminated with high concentrations of PCBs is close to the Housatonic River. The Region asserts that,

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[9] While the Subpart S rule has not as yet become final, it constitutes the Agency's most recent, comprehensive articulation of its views regarding corrective action under Section 3004(u). *In re Sandoz Pharmaceuticals Corporation*, RCRA Appeal No. 91-14, at 9 (EAB, July 9, 1992); *In re W. R. Grace & Company*, RCRA Appeal No. 89-28, at 2 (Administrator, March 25, 1991).

while not a drinking water source, the river supports a vast ecosystem, and bioaccumulation of PCBs in fish and other aquatic life has been documented.

The Region also argues its selection of excavation as the prescribed method of dealing with the hot spots is the kind of technical decision well within the purview of Regional discretion. The Region rejects the notion that it should follow the lead of Massachusetts, which has required GE to pave, fence, and restrict access to the hot spots. The Region argues that there is no legal basis for requiring the Region to follow state-approved measures that are less stringent than Federal requirements.

After carefully considering the arguments presented by the parties, we conclude that the interim measure at issue need not be changed. We believe that the immediacy and magnitude of the threat posed by the hot spots are sufficient to warrant the imposition of an interim measure. As the Administrator noted in the *BFGoodrich* decision, whether a threat is sufficiently immediate depends on the time before a permanent remedy can be implemented. We are persuaded that the Region has carefully considered the immediacy and magnitude of the threat posed by the hot spots. We also agree that the factors listed in the proposed Subpart S rule and cited by the Region in support of its imposition of an interim measure apply here. In particular, we are persuaded that the high concentration of PCBs in surficial soil in close proximity to the Housatonic River and the time before a permanent remedy can be implemented weigh heavily in favor of an interim measure. We also note that the interim measure at issue meets three of the criteria for imposing interim measures set out in the Agency's guidance document on RFIs. *RCRA Facility Investigation (RFI) Guidance*, EPA 530/SW-89-031, Volume I, at 8-27 (May 1989). Specifically, the following factors listed in the guidance document support imposition of the interim measure at issue: (1) "Actual or potential exposure of nearby human populations or animals to hazardous wastes or constituents;" (2) "Actual or potential contamination of drinking water supplies or sensitive ecosystems;" and (3) "Presence of high concentrations of hazardous wastes or constituents in soils largely at or near the surface that may migrate readily to receptors, or to which the public may be inadvertently or unknowingly exposed." *Id*.

We also conclude that the Region's selected method of dealing with the hot spots -- excavation -- is not unreasonable. The Region's selection of a method is the kind of technical decision that is best decided on the Regional level, and absent some compelling circumstance, we are inclined to defer to it. GE has not presented

any compelling reasons not to defer to the Region's decision in this instance. Accordingly, this issue is dismissed. [10]

Interim Measure 4: This interim measure requires GE to develop a plan to prevent infiltration of a groundwater contaminant plume into Unkamet Brook and the Housatonic River. The Fact Sheet issued by the Region states that, in the relevant area:

> [V]olatile organic constituents including benzene, chlorobenzene, and methylene chloride have been detected in the groundwater. * * * The 1986 groundwater monitoring results indicated volatile organic constituents have reached the Housatonic River from the East Plant/Unkamet Brook area plume. According to GE's "Report on Past Hazardous Waste Monitoring and Remedial Actions," analyses of Unkamet Brook also indicate the sediments are contaminated with PCBs.

Petition for Review, Exhibit C, Document 1, Fact Sheet, at 4-5. In its response to the petition for review, the Region explains that Unkamet Brook lies within a plume of contamination and acts as a migration pathway for contamination into the Housatonic River. The Region points out that no provision has been made to intercept the plume prior to its discharge into the river. The Region states that the interim measure being challenged here, together with other interim measures, are designed to prevent further contamination of the river system, which the Region describes as "an extremely high priority." Region's Response to Petition for Review, at 56. The Region notes that its approach is consistent with the recommendations made in the RCRA Implementation Study, at 81. [11] In its

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[10] The conflict between the Region's approach (*i.e.*, excavation) and MDEP's approach (*i.e.*, fencing, paving, and restricting access) would appear to be the kind of conflict that triggers application of the MOU between the two agencies. *See* Section A *supra*.

[11] The RCRA Implementation Study recommends that Regions:

> Adopt a three-phase approach to corrective action, giving emergency actions and control of releases at all facilities higher program priority in the near term than final cleanup actions at most facilities. The great majority of near-term work would be in the second phase, which focuses controlling releases at facilities by using interim measures. The objective of the first and second phases is to make facilities safe and stable before undertaking long-term cleanups. The third phase consists of the final cleanup of the stabilized facility. To the extent practicable, interim measures should be specified after completion of RFAs and before completion of RFIs.

(continued...)

response to comments, the Region describes the contaminant plume as an "imminent threat to the Unkamet Brook, the Housatonic River and their receptors." Petition for Review, Exhibit B, Region's Responsiveness Summary, at 3-157.

GE challenges the assertion that the plume poses an imminent threat. It argues that the 1986 groundwater study relied upon by the Region in the Fact Sheet actually reaches a conclusion that supports GE's position: the contribution of VOCs by the plume to the River and the Brook is negligible. GE quotes the 1986 study as concluding that "[t]he calculated VOC content in the Housatonic River after mixing with the plume discharge is less than 1 ug/l (below the detection limit)," and that "[t]he levels of VOCs in Unkamet Brook surface water do not represent a hazard to aquatic life because the results are below the USEPA Ambient Water-Quality Criteria for acute toxicity." Petition for Review, at 51 (quoting 1986 study). GE also cites a 1988 study performed by Geraghty & Miller, which according to GE concluded that the contaminant plume "results in an estimated groundwater contribution of less than 1.0 ppb (ug/l) total VOCs to the Housatonic River (accounting for dilution) and no detectable contribution of VOCs to Unkamet Brook (accounting for dilution)." Petition for Review, Exhibit C, Document 6, Comments on Draft Permit, at 144-145.

After carefully considering the arguments made by the parties, we are remanding this issue for further consideration by the Region. The factual basis for the Region's decision to impose the subject interim measure is the 1986 study cited by the Region in the Fact Sheet. But as GE has pointed out, the 1986 study appears to support GE's position that contamination of the Unkamet Brook and Housatonic River from the plume has been negligible. In its response to the petition for review, the Region does not rebut GE's arguments about the 1986 study. GE's arguments and the Region's failure to respond to them raise serious doubts about whether the plume poses a threat warranting an interim measure. On remand, the Region should review its factual basis for imposing the interim measure. If it decides to retain the interim measure, it should supplement its response to comments to explain why the 1986 study supports its decision.

Interim Measure 6: This interim measure requires the Region to propose a plan to remove the contaminated soil around a leaking underground storage tank (designated SWMU O-M). GE challenges this interim measure as unnecessary,

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[11](...continued)
The Nation's Hazardous Waste Management Program at a Crossroads: The RCRA Implementation Study, EPA/530-SW-90-069, at 81 (Office of Solid Waste & Emergency Response, July 1990).

arguing that the only soil contamination from the tank occurred during two leak tests because of a loose fitting on top of the tank. GE asserts that, after the loose fitting was repaired, the tank was found not to leak. GE questions why the small amount of gasoline-contaminated soil, which is underground and not accessible, warrants an interim measure. GE also argues in a footnote that:

> [T]his unit does not even constitute a SWMU since it is an active product tank and there is no evidence of "routine and systematic releases" from it, as would be necessary to make the area around it a SWMU under the permit definition (Permit at 7).

Petition for Review, at 52 n.37.

The Region responds by arguing that the area in question is a SWMU because it has a "history of documented releases and volatilization to air and soils * * *." Region's Response to Petition for Review, at 57. The Region, however, does not give any particulars or cite any documents to support this conclusion, nor does it specifically address GE's argument that the tank has only leaked twice. The Fact Sheet issued by the Region states only that "[t]he tank was determined to be leaking and is releasing gasoline and related hazardous constituents to the subsurface." Petition for Review, Exhibit C, Document 1, Fact Sheet, at 15. It is not clear whether the leaks referred to in the Fact Sheet are the same as the two leaks acknowledged by GE. The Region's response to GE's comments on this issue is only slightly more helpful, stating that "[t]he tank has released gasoline containing aromatic hydrocarbons and metals into the environment." Petition for Review, Appendix B, at 3-107. The Region's response states that its conclusion is based on information provided by GE. It also confirms GE's assertion that a loose fitting led to the leakage. *Id*. The Fact Sheet and the Region's response to GE's comments on this issue are not inconsistent with, and the response to comments actually tends to support, GE's argument that the tank has leaked only two times during a test because of a loose fitting that has since been repaired. GE's argument also draws strength from the Region's failure to address specifically the argument in its response to GE's petition.

If GE's argument is correct, the interim measure at issue may not be appropriate. Accordingly, we are remanding the issue to the Region so that it may reconsider the need for this interim measure. If it decides to retain the interim measure, it must supplement its response to comments either to refute GE's argument that the tank only leaked twice or to explain why the two leaks should be

characterized as routine and systematic and why an interim measure is necessary.[12]

E. *RFI Requirements*

In its petition for review, GE makes the general argument that several of the permit's requirements for the RFI are premature and unjustified at this time, since the extent of the required investigations should depend upon the review of existing data and the results of the ongoing investigations that GE is conducting under State authorities. GE then gives seven examples of permit provisions that are meant to illustrate its general argument. GE, however, appears to believe that its general argument must be addressed separately from the specific examples it offers in support of its argument. *See* GE Reply Brief, at 34. We disagree. The burden is on GE to be specific in its objections to the permit. GE's argument cannot be addressed except through the specific instances identified by GE. It would be unreasonable to assume that GE's general argument applies to every RFI requirement in the permit on the basis of the seven examples offered by GE. Instead, for each of the examples raised by GE, we have made a separate determination of the validity of GE's general argument. A discussion of each of these examples follows.

Subsurface Soil Sampling Requirements at Facility: GE challenges the permit's requirements for subsurface soil sampling, particularly at several SWMUs that are covered with concrete or clean fill. GE argues that data from other investigations, such as surficial soil sampling and groundwater monitoring, are adequate to characterize releases from the SWMU's. GE asserts that the major migration pathway for any contaminants in the subsurface soil at these units is via groundwater and that the groundwater investigations required by the permit will detect the migration of any such contaminants.

The Region responds by giving a detailed explanation of the basis for requiring subsurface soil sampling at all of the SWMU's that were identified by GE in its petition as examples of its argument. Region's Response to Petition for Review, at 63-67. For purposes of addressing GE's argument, however, the Region's argument can be boiled down to the following proposition: the

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[12] GE reports that, since the petition for review was filed, it has on its own initiative removed the underground storage tank and the associated contaminated soil. GE's Supplemental Brief, at 30-31. On remand, the Region may want to consider whether, in light of this new information, an interim measure is still justified.

groundwater investigations referred to by GE will not detect contaminants that either have become bound with the soil, have not entered into solution, or have not mobilized with groundwater.

GE counters that the contaminants described by the Region would not be migrating and thus do not need to be characterized. GE contends that other investigations could provide sufficient information to carry out the Health and Environmental Assessment and the Corrective Measures Study. GE believes that the subject SWMUs are located within an active, access-restricted operating plant under GE's control, which is the kind of facility that warrants the use of conditional remedies. Under the proposed Subpart S corrective action rule, the use of conditional remedies would be authorized. *See* 55 Fed. Reg. 30,879 (July 27, 1990)(proposed 40 CFR §264.525(f)). The preamble to Subpart S describes conditional remedies as follows:

> Generally, a conditional remedy would allow existing contamination (sometimes at existing levels) to remain within the facility boundary, provided that certain conditions are met. These conditions would include achieving media cleanup standards for any releases that have migrated beyond the facility boundary as soon as practicable, implementing source control measures that will ensure that continued releases are effectively controlled, controlling the further migration of on-site contamination, and providing financial assurance for the ultimate completion of cleanup.

Id. at 30,833. GE cites the above-quoted preamble in support of its argument that, because conditional remedies would be appropriate for its facility, there is no need to require RFI investigations for releases that are not migrating. The Region responds that releases must be characterized before conditional remedies may be imposed.

Essentially, GE is arguing that it is not necessary to characterize subsurface soil contamination that is not currently migrating. We disagree. Even if the Subpart S proposal were now in effect, it would still be necessary to conduct an investigation of the site to determine whether a conditional remedy is appropriate. *See* 55 Fed. Reg. 30,874 (July 27, 1990)(proposed §264.511(a)). Even if a release is not currently migrating, it may still be useful to the Region to know the extent and concentration of the release. Such information may enable the Region to predict whether migration is likely in the future. Accordingly, we do not believe that it is unreasonable for the Region to require GE to provide such

information, and we decline to direct the Region to delete the subsurface soil sampling requirements.

Constituents to Be Analyzed in Soil Samples: The permit requires that all soil samples must be analyzed during the first round of samples taken at each location for all constituents listed in Appendix IX of 40 CFR Part 264 (Groundwater Monitoring List). *See* Petition for Review, Exhibit A, Final Permit, at 18, 21, 24. GE believes this requirement is overbroad and that, for a given area, Appendix IX analysis of soil samples from a number of selected soil borings in the area would be sufficient to identify the constituents likely to be present in the area. [13] GE states that, after these results (as well as prior data) are reviewed, a list of "target" constituents should be developed for that area, subject to EPA review. Samples from other borings in the area would then be analyzed for these "target" constituents, even during the initial sampling of the borings.

Since the filing of the petition for review, the Region has agreed to change the requirements relating to the analysis of soil samples. Region's Supplementary Brief, Attachment I, at 4. The Region now agrees that, for a given SWMU, GE may select a representative soil boring for initial full scan of Appendix IX constituents and based on those results, develop a list of target constituents to be analyzed for in the remaining borings in that area. If the initial sampling and Appendix IX data are adequate to characterize the constituents in the soil at or around a given SWMU, the subsequent soil borings for that SWMU would not have to be analyzed for all Appendix IX constituents. GE's Supplemental Brief, Exhibit B, at 4.

In a footnote to its Supplementary Brief, GE argues that the Region's concessions do not resolve the issue, since GE would still be required to do a full Appendix IX analysis of at least one soil sample at each SWMU. GE Supplemental Brief, at 33 n.22. While GE does not explain why a full Appendix IX analysis of at least one soil sample at each SWMU would be unreasonable, the implication of GE's footnote is that a full Appendix IX analysis of one soil sample is sufficient to characterize an "area" much larger than a single SWMU. If that is GE's contention, we disagree. It is does not seem unreasonable for the Region to treat each SWMU as one "area" for purposes of the target approach suggested by GE, because each SWMU is a separate source of contamination and a list of target constituents applicable to one SWMU will not necessarily be representative of another SWMU. Accordingly, we decline to direct the Region to alter the approach agreed to by the Region and outlined above.

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[13] In its Petition for Review, GE does not define what it means by an "area."

Requirements to Sample Other Media: The permit originally required GE to perform ambient air monitoring at SWMU G-5 (Building 78 Landfill) for particulate matter and volatile constituents. After the petition was filed, GE capped the Building 78 Landfill, and the Region agreed to withdraw the requirement for particulate monitoring. The Region, however, did not agree to withdraw the requirement for volatiles monitoring. In its petition for review, GE argues that monitoring for volatiles should be required only if the soil borings and subsurface gas investigation at the landfill show potential volatile organic emissions. The Region responds that the landfill showed evidence of hydrocarbons disposal, and that hydrocarbon odors were detected during the Visual Site Inspection phase of the RFA. The Region states that the landfill, even if covered with a cap, is not equipped with a venting system that would eliminate migration to the air.

In its supplemental brief, GE states that its investigations in the relevant area, which GE reported to the Region in a Current Assessment Summary (CAS) Report submitted in September 1991, do not show the presence of significant volatiles emissions. GE contends that, before imposing the RFI requirement at issue, the Region should review GE's report, and if it concurs that the data do not show a significant volatiles problem in the area, it should delete the requirement for volatiles monitoring. In its supplemental brief, the Region does not address this issue.

We are not persuaded that the volatiles monitoring requirement in the permit is unreasonable. GE has not met its burden of showing that the Region's technical judgment on this issue is clearly erroneous. The 1991 CAS report relied on by GE may indeed support GE's position, but it was submitted to the Region after the final permit was issued and is not part of the record upon which the Regional Administrator based her decision. Accordingly, it does not affect the validity of that decision. [14]

Underground Pipes, Tunnels, and Tanks: The permit requires GE to include in the RFI detailed information about underground pipes, tunnels, storage tanks, and other "preferential pathways" at the facility, including maps showing the location of all such pathways, a description of the condition of the pathways, a description of the materials stored or conveyed in the pathways, a proposal for evaluating the effect of the pathways on groundwater and contaminant movement,

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[14] Under the Final Permit, the CAS Report must be included in GE's RFI proposal and will be considered by the Region when the RFI proposal is submitted. At that time, if the information in the CAS Report shows that the RFI requirement is unnecessary, the Region should delete the requirement from the permit.

and a proposed approach for assessing the contribution of releases from such pathways to all media. Petition for Review, Exhibit A, Final Permit, at 21-22. GE argues that these requirements are far too broad. For one thing, GE argues, the provision would include underground pipes that never carried waste. GE represents that, because the facility has been used for many decades for industrial purposes, it does not even know the location of all underground pipes, tunnels and tanks, much less the other information required by the permit. GE further contends that any materials entering into pipes and tunnels on GE's property will be conveyed to a permitted outfall and will be evaluated and monitored under GE's NPDES permit. GE argues, therefore, that prior to specifying the requirements for all underground pipes, tunnels, and tanks, the data from GE's groundwater monitoring programs, its NPDES program, and its soil excavation program should be reviewed. If such data identify specific concerns relating to particular conveyances or tanks, the Region can then require detailed and focused investigations for such units. Petition for Review, at 64.

The Region responds that some of the underground pipes, tunnels, tanks, and conveyances at the facility have existed since the late 1880's and that such conveyances carried process wastes, waste oil, stormwater, and sanitary wastes. The Region argues that an assessment of these conveyances, some of which drain to the Housatonic River, is essential to any site characterization and to any corrective measures assessment and implementation recommendation. The Region points out that GE has already done preliminary investigative work through its NPDES requirements and through its own privately commissioned studies and that such information can be submitted as part of the Current Assessment Summary to narrow the scope of current proposals and to identify existing data gaps.

The Region notes that the RFI process is a phased one and that as further information develops about the extent of these conveyances, it can be developed and submitted. The Region also states that if conveyances are impossible to locate or characterize, GE is free to present the information supporting that conclusion. The Region can then modify the requirements to conform to the practical limitations presented. In its reply brief, GE responds that such "qualifications are not contained in the permit and seem more akin to the kind of approach that GE suggested." GE Reply Brief, at 41.

We are not persuaded that the Region can learn everything it needs to learn through its groundwater monitoring programs, its NPDES program, and its soil excavation program. It is easily conceivable that such programs would not alert the Region to all of the potential problems posed by the myriad pipes, tunnels, tanks, and conveyances underground at the facility. GE's position that everything

the Region needs to know about underground pathways at the facility can be gained through these other programs is undercut by GE's admission that it does not know where all of the pathways are or what condition they are in. Accordingly, we conclude that the Region need not alter the permit requirements at issue. We note, however, that we are upholding the permit requirements as they have been interpreted by the Region. The Region has interpreted the permit as providing that: (1) the RFI process relating to underground pathways will be phased so that later stages can reflect information gained during earlier stages; and (2) if underground pathways cannot be located, GE can present evidence to that effect, and the Region will modify the RFI requirements accordingly. As GE noted in its reply brief, the Region's interpretation is "akin to the kind of approach that GE suggested." *Id*. We adopt this interpretation as an authoritative reading of the permit that is binding on the Agency.

F. *Deadlines*

The permit imposes specific deadlines for all of the submissions that GE is required to make under the permit. GE argues that some of these deadlines are arbitrary and unjustified. [15] GE asserts that the permit imposes deadlines for activities that are as yet undetermined.

The Region responds that the schedules in GE's permit reflect Regional and national experience in formulating corrective action timetables. The Region states that GE is free at any time to request extensions from the deadlines. The Region also notes that the requirement for submission of the *Project Management Plan* will allow GE to propose extended time-frames for the RFI submittals. [16]

We conclude that the Region need not change the timetables imposed in the permit. Where corrective action cannot be completed prior to issuance of the

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[15] In particular, GE objects to the 30-day period prescribed in the permit for simultaneously preparing proposals for 13 interim measures. GE believes that it will take at least 60 days to prepare such proposals. We note, however, that of the 13 interim measures for which proposals are required in the permit, GE committed to proceed with submitting proposals for five measures that were not challenged on appeal. We also note that of the eight measures challenged on appeal, the Region has agreed to withdraw five of them, GE Supplemental Brief, at 28, and of the remaining three measures on appeal, we are remanding two for reconsideration. Thus, whatever force GE's original argument had, that force has been significantly diminished by subsequent events.

[16] The *Project Management Plan* is a document to be submitted by GE as part of its RFI proposal, establishing a proposed schedule within which specified elements of the work required under the permit must be completed. The Region represents that timetables will continually be developed to reflect ongoing work. Petition for Review, Appendix A, Final Permit, at 80.

permit, "EPA is statutorily compelled to devise and impose 'schedules of compliance' for corrective action" such as the schedules contained in GE's permit. *W.R. Grace & Co. v. E.P.A.*, 959 F.2d 360 (1st Cir. 1992)(citing RCRA §3004(u), 42 U.S.C. §6924(u)). [17] GE has not persuaded us that the challenged deadlines are unreasonable on their face. Absent such a showing, we will defer to the Region's extensive experience in setting such deadlines. We also note that the deadlines are subject to modification if future circumstances so warrant. Accordingly, this issue is dismissed. *See W.R. Grace & Company*, RCRA Appeal No. 89-28, at 4 n.6 (March 25, 1992)(rejecting challenge to deadlines in permit). [18]

G. *General Conditions*

Section 270.30 of the rules contains a list of permit conditions that must be included in all RCRA permits, either expressly or by reference. 40 CFR §270.30. The Region included these "boilerplate" provisions in slightly modified form among the General Conditions in GE's corrective action permit. GE argues that the requirements of Section 270.30 should not be applied inflexibly in the corrective action context, because such requirements were written to apply to permits for hazardous waste treatment, storage and disposal facilities, which GE argues are much more limited in extent than an entire plant site and off-site areas that may be covered by a corrective action permit. GE believes that, where a corrective action permit is issued for massive sites such as the GE facility and associated off-site areas, the Region issuing the permit should be allowed and directed to make appropriate modifications to Section 270.30 conditions to make them more suitable to the site. GE notes that the requirements of Section 270.30 were promulgated in 1980, before the corrective action requirements were promulgated and that they therefore were not meant to apply in the corrective action context. As an example of a boilerplate condition that should be modified, GE cites the General Condition 1.17 of the permit. That condition requires GE to notify the Region of "any planned physical alterations or additions to the Facility covered by

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[17] RCRA Section 3004(u) provides that "[p]ermits issued under section 6925 of this title shall contain schedules of compliance for such corrective action (where such corrective action cannot be completed prior to issuance of the permit) * * *." 42 U.S.C. §6924.

[18] We note that the Region has offered to modify the permit time schedules to conform with many of the deadlines in the Massachusetts's Consent Orders. Region's Supplemental Brief, at 26. In light of this willingness to accommodate GE's concerns about deadlines, we are even less inclined to second-guess the Region's judgment in this area. *See In re Sandoz Pharmaceuticals Corp.*, RCRA Appeal No. 91-14, at 12 (EAB, July 9, 1992)("The Region's obvious willingness to accommodate Sandoz' concerns about time constraints, as evidenced by its revisions to the draft permit, convinces us that Sandoz' concerns are adequately addressed by the permit provision allowing for modification of the compliance schedule when unforeseen circumstances require a change.").

this Permit." GE believes this condition should be amended to cover only alterations or additions that could affect GE's obligations or activities under the corrective action permit and should exclude emergencies.

The Region responds that the requirements of Section 270.30 are applicable to all RCRA permits including HSWA permits issued by the Agency. The Region points out that Section 270.30 has been amended twice since 1983 (once at 50 Fed. Reg. 28,752 (July 15, 1985) and again at 53 Fed. Reg. 37,935 (September 28, 1988)) and that in neither instance was the section amended to exclude HSWA permits from its scope. The Region also states that its position on the applicability of the general permit conditions was affirmed on December 19, 1990 in *In re BFGoodrich Company*, RCRA Appeal No. 89-29 (December 21, 1990). [19]

In its supplemental brief, GE represents that the Region has now agreed to amend the introductory sentence to provide that GE shall comply with the General Conditions "to the extent such conditions relate to permittee's corrective action activities under the permit," and to amend General Condition 16, which prescribes who must sign GE's submissions to the Region. GE Reply Brief, Annex D, at 1 (proposed changes to make general permit conditions appropriate for a corrective-action permit).

When the boilerplate requirements of §270.30 were promulgated, a RCRA permit was issued by a single agency, either by EPA or an authorized State.

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[19] In *BFGoodrich*, the permittee challenged the inclusion in a corrective action permit of a condition identical to General Condition 1.17 quoted above. BFGoodrich argued that the condition was overbroad and bore no relation to the protection of human health and the environment. The Administrator declined to grant review on the issue, noting that the scope of the permit condition was identical to the boilerplate condition in Section 270.30(l)(1). The Administrator observed that:

> Again, BFGoodrich has presented no good reason to depart from the Agency's policy of declining to consider challenges in individual permit proceedings to the requirements and policies embodied in its rules.

Id. at 9. The Administrator noted that the Region was not arguing that Section 270.30 provided direct legal authority for the contested permit condition, but was instead asserting that the condition was based on Section 264.101, the corrective action rule. The Administrator concluded, however, that:

> [G]iven the similarity between the contested condition and §270.30(l)(1), the Agency will not entertain a challenge to the scope of this condition in this proceeding.

Id. at 9, n.9.

Since the passage of the Hazardous and Solid Waste Amendments (including the corrective action requirements), however, it is frequently the case that one part of the permit, containing pre-HSWA requirements, is issued by an authorized State, while another part of the permit, containing HSWA requirements, is issued by the Agency. The reason is that States that were authorized to issue RCRA permits before 1984 did not automatically become authorized to impose HSWA requirements in 1984, and until such States do become authorized, the Agency is responsible for issuing the portions of permits that impose the HSWA requirements in those States. 42 U.S.C.A. 6926(g); 40 CFR §§271.3(b)(3) & 271.134(f). In these circumstances, the State and Federal portions of the permit together constitute the RCRA permit. *See In re Marathon Petroleum Company*, RCRA Appeal No. 88-24, at 1 n.1 (November 16, 1990)("Since Illinois has not yet received authorization to administer the HSWA portion of the permit, EPA establishes the requirements mandated by HSWA. Only after both the State and federal portions of the permit have been issued does the permittee have a full RCRA permit."). [20] The question before us then is whether Section 270.30 requires or even authorizes the inclusion of the Section 270.30 boilerplate requirements in the HSWA portion of the permit when a State has issued the non-HSWA portion of a permit containing requirements at least as stringent.

We are of the view that Section 270.30 neither requires nor authorizes the inclusion of the boilerplate requirements in the split permit situation described above. The Region is correct in arguing that the boilerplate requirements must be included in every RCRA permit, but in a split permit composed of a federal HSWA portion and a State non-HSWA portion, it is the State's responsibility to implement the boilerplate requirements. Under the rules, a State issuing the non-HSWA portion of the permit is required to include conditions at least as stringent as the requirements of Section 270.30. 40 CFR §271.14(i). When the State issues the non-HSWA portion of the permit, the Agency is only responsible for implementing the HSWA amendments. In this regard, we note that Section 270.30 does not appear on the comprehensive list of regulations implementing the HSWA amendments at 40 CFR §271.1(j). We also note that the Model corrective action permit issued by the Director of the Permits and State Programs Division of the

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[20] While the State and Federal portions constitute the complete RCRA permit, a defect in the State-issued portion does not affect the validity of the Federal portion. *In re Adcom Wire, d/b/a Adcom Wire Company*, RCRA Appeal No. 92-2 (September 3, 1992).

Office of Solid Waste and Emergency Response does not contain such requirements. [21]

If a Region wants to include requirements similar to the ones in Section 270.30, it must find authority for such requirements in the corrective action rule at 40 CFR §264.101. If such conditions, as they appear in Section 270.30, need to be tailored to reflect their intended application to corrective action activities, the Region must do so. The general conditions at issue here were adopted wholesale from the Section 270.30 boilerplate requirements without such tailoring. The Region itself admits that for the most part the challenged general conditions are essentially identical to those found at Section 270.30. Region's Response to Petition for Review, at 76. Moreover, the Region has implicitly conceded that such conditions, as written, may need tailoring to fit within the corrective action context, by agreeing to amend the introductory sentence of the General Conditions to provide that GE shall comply with the General Conditions "to the extent such conditions relate to permittee's corrective action activities under the permit." GE Reply Brief, Annex D, at 1.

That introductory language, however, does not totally cure the problem, because the Region improperly relied on Section 270.30 as its justification for including the disputed provisions. Thus, we cannot be certain that the Region ever made a determination that such provisions are necessary to implement the corrective action rule at Section 264.101, which is the justification for the other provisions in the permit. [22] Similarly, because the Region incorrectly believed it was compelled by Section 270.30 to include the disputed provisions, the Region refused to consider some of GE's suggestions for tailoring the provisions. As a result, despite the introductory language, we cannot be certain that the Region ever made a determination that the scope of each provision, as written, is appropriate in the corrective action context. The Region should at least consider GE's suggestions and articulate a legally supportable rationale for its conclusions.

Accordingly, we are remanding this issue to the Region so that the Region may consider whether, in light of this opinion, any of the General Conditions drawn

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[21] The proposed Subpart S rule does not address the issue of whether, in a split permit situation, the Agency should include the Section 270.30 boilerplate requirements.

[22] This does not mean that a Region has to articulate a separate justification as to why these provisions are necessary to implement the corrective action rule at Section 264.101; it only means that, in this case, in view of our ruling that Section 270.30 does not provide a basis for the provisions, the Region should consider whether such provisions still belong in the corrective action portion of the permit and assure any finding that the permit is "necessary to protect human health and the environment" extends to these provisions.

from Section 270.30 should remain in the permit. If the Region believes that such conditions should remain in the permit, it must find authority for such requirements in the corrective action rule at 40 CFR §264.101. The Region should also consider whether any such conditions need to be further tailored to reflect their intended application to corrective action activities. [23]

III. *CONCLUSION*

For all the foregoing reasons, the following issues are hereby remanded to the Region for further consideration consistent with this opinion: (1) whether Interim Measure 4 is necessary; (2) whether Interim Measure 6 is necessary; and (3) whether the conditions in the permit that are drawn from Section 270.30 are authorized by the corrective action rule at 40 CFR §264.101 and whether they are adequately tailored to reflect their intended application to corrective action activities. In addition, on remand, the Region should implement the revisions agreed to by GE and the Region. Under 40 CFR §124.19(f)(1)(iii), GE will not need to appeal the results of the remand in order to exhaust its administrative remedies for purposes of judicial review. The Board is reserving judgment on the issue relating to the absence of a review mechanism for Regional revisions of interim submissions. The other issues raised in GE's petition for review are hereby dismissed.

So ordered.

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[23] As discussed in note 19 *supra*, in *BFGoodrich*, the Administrator refused to consider the permittee's argument that the boilerplate provision included in the HSWA portion of BFGoodrich's permit needed to be tailored to make it fit within the corrective action context. The Administrator reasoned that, even though the Region had invoked Section 264.101 as legal authority for the provision, the scope of the provision could not be challenged on appeal because the provision was taken verbatim from Section 270.30. The Administrator, however, did not fully consider whether a provision that is meant to implement the corrective action rule at Section 264.101 must be tailored to make it appropriate in a corrective action context. Having fully considered that issue, the Board is of the view that such a provision must be tailored if necessary and that, accordingly, the scope of such a provision may be challenged on appeal. To the extent the *BFGoodrich* decision is inconsistent with this view, it is overruled.